



Managing Design-Build Risks From Design Through Construction

By Gina Armbruster | Friday, August 23, 2019

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Design-build has become a widely-used construction project-delivery method due to the ability to complete projects quickly and efficiently while also reducing costs. However, along with these advantages are the increased risks that can confront both contractors and design professionals throughout project lifecycles.

Contractors traditionally warrant and guarantee that their work will conform to the plans and specifications but do not warrant the design or the success of the overall project. On a design-build project, the design-build prime contractor is responsible for the project's success as a whole and an owner may expect the contractor to warrant the project's performance. As a result, the design-build prime contractor may have exposure for design errors and omissions on the part of its design professional consultant.

Conversely, the standard of care for a design professional is the care and skill ordinarily used by members of his or her profession practicing under similar circumstances and in the same geographical area and it does not ordinarily include warranting or guaranteeing a successful project outcome. If a design firm is the prime design-builder, this changes and the firm may have exposure for construction issues with a higher standard of care.

Another potential issue faced by all parties involved in the design-build environment is scope creep. This can occur when the amount or type of services expands without a corresponding increase in compensation. This is primarily due to the inherent collaborative atmosphere of the design-build process wherein a simple consultation or suggestion can lead to increased exposure for the party offering the suggestion. For these reasons, each party participating in the project should be sure they do not perform activities or make suggestions outside their contractually-mandated and defined scope of work. This is oftentimes difficult when working within a design-build process where the lines of professional responsibility are often blurred, if not totally erased.

However, there are ways that each of the parties can protect itself throughout the design-build process. The first, and arguably the most important step is negotiating a good contract. One that clearly defines each entity's role and also their levels of responsibility if and/or when things go wrong. In addition to standard contract terms, every design-build contract should be written to clearly provide provisions addressing the:

- scope of services, roles, authority and responsibilities of all parties throughout the construction process;
- identification and allocation of the risks assumed by each party;

- warranties and performance guarantees: the design-build prime contractor's liability can be limited to the traditional "appropriate levels of skill and care" standard by including that language in the design-build agreement. The contractor should also be careful not to warrant clear system of communication between the design-builder and the owner, as well as the downstream parties, including a procedure to report when problems arise;
- submittal/approval processes, including applicable timelines for submission and approval;
- dispute resolution, including processes for initial dispute reporting through resolution;
- indemnification provisions, including a provision that each party should be held responsible for its own acts only;
- limitations of liability;
- insurance requirements of each party; and
- provision that the terms of the design-build contract will be incorporated into the downstream contracts.

Another important way that a design-build prime contractor may protect itself from potential exposures is through a meticulous documentation process and stringent recording and safekeeping of all documents. This starts at the top and should extend to everyone working on the project. Types of documents that should be created and maintained include:

- change orders that provide details regarding the necessity and ensure timely submission;
- schedule;
- communications – think before any correspondence is sent. These documents can be used in litigation to either exonerate or confirm wrongful behavior or acts. Use email to document important discussions, agreements or directives. Do not use email to vent or acknowledge errors as it can be used in litigation;
- documents outlining construction issues and any recommended or rejected solutions;
- reports that document issues which necessitate project changes and their potential effects on the project's cost or schedule; and
- documents with contract/scope changes including the failure to adhere to terms.

Finally, the design-build prime contractor should ensure that all parties have adequate insurance including professional liability insurance. The insurance requirements should be included in the design-build agreement and all downstream contracts. Also be aware of the exclusions, terms and conditions in a professional liability insurance policy, as policy language varies widely between carriers. Another consideration are the limits of liability for every policy which should be commensurate with each party's scope of work and the associated levels of risk.

While design-build projects may create additional risks, adherence to the above contract and documentation guidelines can minimize, if not eliminate, the possible negative effects of these challenges and increase the success and profitability of the project.

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